

I would agree that if the conduct of proceedings by an inferior court or tribunal or person exercising judicial functions has been flagrantly wrong or obviously unjust then there may be reason for an order of *certiorari* on the ground that the rules of natural justice have not been complied with — if, for instance, there was a calculated refusal to hear relevant evidence or receive vital information; or even perhaps if there was a wilful or a reckless misconstruing of all the evidence, or of all the information put forward, and a decision wilfully come to in a completely and obviously false and inaccurate basis. But there was nothing like that here. The probate officer undoubtedly does seem to have assumed (wrongly as far as can be judged from the record) that Madam Soh Mui Lan was the aunt of the deceased. But there was evidence before him that Madam Soh was the deceased's sister-in-law (a closer relation, incidentally, than an aunt-in-law) and that would make her son (present at the proceedings on the 6th of September) a nephew of the deceased; and all in all the probate officer seems to me to have acted quite reasonably. First, he does not wish to give letters of administration to the applicant alone, because she is illiterate (a very valid reason for coming to the opinion that a person entitled is unfit to act). Then the suggestion is that she and Mr. Lee Keng Meng shall be joint administrators; to this the applicant agrees. But Mr. Lee Keng Meng, when he appears, does not wish to be administrator and suggests a Mr. Ho Chua Boon instead of himself; the applicant, however, will not accept Mr. Ho. She at this time also states that Madam Soh is not any relative of her deceased's husband, but that — if she is — she will accept Mr. Lo Kee Seng, Madam Soh's son, as co-administrator. The probate officer then calls for and receives evidence showing that Madam Soh is a relative of the deceased, in fact his sister-in-law. He thereupon decides to grant administration jointly to Madam Soh Mui Lan (still under the title of auntie) and to the applicant. There is nothing on the record to show that the applicant at that time objected to the decision, when made, and she does not state in either of her affidavits that she then objected to it. I do not see how it can be possibly said that the probate officer in any way in his conduct of the proceedings or in coming to his decision was in breach of the rules of natural justice.

On all these premises I rule that there are no grounds for making an order of *certiorari* in respect of the proceedings before the probate officer on the 6th and 10th of September, 1963.

As to the later attempt to have the probate officer change his decision, I am doubtful that the applicant was entitled to try to re-open the matter five months later, and I am a bit at a loss

as to why the letters of administration were never in fact issued. However, giving all possible allowance to the applicant, and accepting for the moment that the application for a change of decision and the refusal to change are part of the proceedings before the probate officer, I can see no reason why he should not refuse to alter his previous valid and reasonable decision. There was nothing wrong or impeachable in his refusal.

This application for orders of *certiorari* and *mandamus* is dismissed and refused.

Application refused.

SCHMIDT v. KEPONG PROSPECTING LTD. & ORS.

[F.C. (Thomson L.P., Barakbah C.J. (Malaya) and Tan Ah Tah F.J.) June 1, 1964]

[K.L. — Federal Court Civil Appeal No. 70 of 1963]

Contract — Jus quaesitum tertio — Stranger has no right to enforce contract — Lack of consideration — Uncertainty.

The appellant a mining engineer actively assisted in obtaining a prospecting permit for a Mr. Tan and was promised a tribute of 1% of the selling price of all iron produced and sold. Subsequently a company was formed to exploit the mining rights and an agreement was made in 1954 under which the company took over the obligation to pay the appellant the tribute of 1%. The appellant continued to assist the company as director and consulting engineer. In 1955 the company and the appellant made an agreement whereby the company agreed to pay the appellant the 1% tribute. The appellant claimed payment of the tribute due to him but his claim was dismissed. He appealed to the Federal Court.

Held: as the appellant was not a party to the 1954 agreement he had no right to enforce it; but the 1955 agreement gave him a right to recover the tribute from the company and this agreement was binding on the company as there was consideration for it in that the appellant had given and undertook to give his services to the company and it was not void for uncertainty.

Cases referred to:—

- (1) *Ex parte Slater* 76 L.T. 529.
- (2) *Dunlop Pneumatic Tyre Co. Ltd. v. Selfridge & Co. Ltd.* [1915] A.C. 847 at p. 853.
- (3) *Scruttons Ltd. v. Midland Silicones Ltd.* [1926] A.C. 446 at p. 468.
- (4) *Shamia v. Joory* [1958] 1 Q.B. 448.

FEDERAL COURT.

A. L. Hills for the appellant.

P. J. Mooney for the first respondent.

Denis Murphy for the respondents (third parties).

Cur. Adv. Vult.

Thomson L.P.: This appellant is a mining engineer who, metaphorically speaking, went on a journey from Jerusalem to Jericho. The first respondent (which I shall call "the company") is a limited liability company registered in the

Federation of Malaya carrying on the business of mining and exporting iron ore. The other respondents who were joined as third parties in the original proceedings are a number of persons who were at one time shareholders in the company. I do not think it is now seriously questioned that they are legally bound to indemnify the company in respect of any liability it may be found to have to Mr. Schmidt in these proceedings.

There are certain *lacunae* in the evidence. There is, however, no real controversy as to the facts of the case. The only question is whether upon these facts, particularly the admitted documents, the appellant is in these proceedings legally entitled to recover certain sums of money to which he would appear to have an extremely strong moral claim.

The story commences in 1953 when one Tan Chew Seah and three associates were negotiating with the Government of the State of Johore for mining rights over an area of iron bearing land near Bukit Kepong.

This area was originally set out in a prospecting permit (No: 10/53) and covered 1,000 acres but the area ultimately involved was later substantially increased.

Before, however, the matter could reach the stage of the issue of a prospecting permit, a necessary step under the local mining law towards the obtaining of actual mining rights, much had to be done and Mr. Tan and his friends who would appear to have been financial persons without technical knowledge and without practical experience of the organisation of a mining undertaking invoked the assistance of the appellant who is a well qualified mining engineer with many years of local experience.

A considerable amount of work had to be done and many difficulties had to be overcome. A survey had to be made and prospecting had to be done to meet the requirements of the Mines Department. The Communist War was still alive and Communist forces were active in the area in question. In consequence, to meet the requirements of the security authorities, armed guards for those carrying on this work had to be recruited and trained. Then, no doubt as a result of the notorious unreliability of inexperienced preliminary surveys in iron ore areas where the ore is near the surface, it was found that much of the deposit which the associates had in mind lay outside the area in respect of which application had been made for the prospecting permit and it was then found that this new area had been included in Malay Reservation and was therefore not available for mining until the Reservation boundaries were altered, a matter which involved

A lengthy negotiation with the appropriate authorities. In the event all these difficulties were overcome by the exertions of the appellant. It should, however, be observed that mining leases which were in respect of areas of 875 acres and 760 acres respectively, a total of 1,635 acres, were not finally approved till about December, 1955. One of these leases was in respect of a portion of the land to which the original prospecting permit (No: 10/35) related and the other was in respect of land covered by a later prospecting permit (No: 3/55) for which application was made some time in July, 1954. It is not clear on the evidence which lease corresponds to which prospecting permit and the point is of no importance. It is, however, necessary to mention the existence of the two leases and the two permits to explain certain subsequent events on which it was sought, to my mind unjustly, to found some sort of accusation of bad faith against the appellant.

D When it became clear to Mr. Tan and his associates and the appellant that their efforts to obtain substantial mining rights were about to be successful they agreed to form a private company, the present respondent company, to exploit these rights. It was agreed among them that Mr. Tan and his associates who had provided, and were going to provide, the necessary money should have substantial allotments of shares in the company while the appellant, who had received no remuneration whatsoever for all the work he had done, though he had been paid his expenses, should have a nominal shareholding, and in addition should be paid a tribute of 1% of the selling price of all iron ore produced and sold. In this connection Mr. Tan wrote the following letter to the appellant which is dated 2nd December, 1953:—

G "Having received on 25/XI/53 my prospecting permit No: 10/53 over 1000 acres of State land at Bukit Kepong, Johore I hereby agree to ensure that you are paid one per cent (1%) of the selling price of all ore that may be sold from any portion of the said land. This is in payment for the work you have done in assisting to obtain the prospecting permit and any work you may do in assisting to have mining operations started up."

H Steps were taken to proceed with the formation of the company and in the event it was incorporated on 27th July, 1954. At that date, it will be remembered, neither of the mining leases had been formally approved and the second prospecting permit (No: 3/55) had not been issued though application for it had been made.

I In the meantime, on 11th July, 1954, Mr. Tan had executed a power of attorney in favour of the appellant. It related that Mr. Tan was frequently absent from the country and it enumerated certain of his mining interests including his rights under prospecting permit No: 10/53 in respect of what was called the Bukit

Kepong land and his potential rights under a prospecting permit for which he had applied in respect of what was called the Landkap land, which was clearly a reference to the Permit which was later issued as No: 3/55. It then gave the appellant extremely wide powers which it is not necessary to set out in detail to deal with these interests and to act on the grantor's behalf in connection with the incorporation and subsequent conduct of the affairs of the proposed company.

The first meeting of the directors was held on 31st July, 1954, when the company had still not yet acquired any of the mining rights which it had been formed to exploit. At that meeting the board agreed to the execution of an agreement with Mr. Tan (which I shall call the "1954 agreement") which was the basis of all the company's subsequent activities.

That agreement referred to what it called "the said land" which was defined as including the land comprised in the land in respect of which Mr. Tan (who was called "the permit holder") held prospecting permit No: 10/53 and "all or any neighbouring land comprising the same mining project whether applied for before or after the date of this agreement". It recited, *inter alia*, that Mr. Tan was desirous that the company should work his mining rights "in respect of the said land", that the company had agreed to allot to him a number of fully-paid up shares and that he had agreed to ensure that the appellant should be paid 1% of the selling price of any ore sold from the land "in consideration of his services rendered in the past, the present and to be rendered in the future". It went on to provide that Mr. Tan was to permit the company to work the land; that he was to make all such applications for mining leases and so forth as the company might request; that he was to be a permanent director of the company; and that he was to receive one fully-paid \$1 share for every share allotted to the other shareholders subject to a maximum of 200,000 shares. Then there was a provision concerning the appellant which was as follows:—

"The company shall take over the obligation of the permit holder to pay A. E. Schmidt 1% of the selling price of all ore that may be sold from any portion of the 1,000 acres of State Land at Bukit Kepong with the following modifications:—

(1) the obligation shall be extended so as to include the said land as defined in this agreement, and

(2) the tribute of 1% shall be payable on the selling price of the ore as shown in the company's records."

That agreement was duly executed on behalf of the company and was signed by the appellant on behalf of Mr. Tan by virtue of his power of attorney.

The company then commenced its operations, to which it will be necessary to return, but at

A some time subsequent to the execution of the 1954 agreement the appellant, or his legal advisers, began to have doubts as to whether his interests were adequately protected by that agreement. In the event a new agreement was drawn up which I shall call the "1955 agreement". This agreement was adopted by the directors on 26th September, 1955, and it was executed. It bears the date 26th September, 1955, but there has been some question, which will be dealt with later, as to whether it was actually executed on that day or a few days afterwards.

The parties to that agreement were the company and the appellant (who is called "the consulting engineer"). It recited the fact of the 1954 agreement which is attached to it and set out in full clause 4 of that agreement which has already been quoted. It then recited that "it is deemed advisable that the company should enter into this supplementary agreement" with the appellant. The remainder must be quoted in full:—

"I. The company shall in consideration of the services rendered by the consulting engineer for and on behalf of the company prior to its formation, after incorporation, and for future services pay to the consulting engineer 1% (one per cent) of all ore that may be won from any portion of the said land (which expression shall bear the same meaning as given in the said agreement) by way of tribute which said tribute of 1% being calculated on the selling price of the ore as shown in the company's records.

II. The company's obligation as aforesaid shall in any event continue until the said land is worked out and shall not cease in the event of the death or retirement of the consulting engineer before that happening.

III. The obligations herein contained shall be binding on the successors in title assigns and personal representatives of the parties hereto as the case may be."

For over two years the operations of the company were organised and controlled by the appellant and it is clear from the evidence that this involved a great deal of work. He was one of the original directors and was chairman of the board from the incorporation on 27th July, 1954, till 1st October, 1956. On 12th March, 1955, he was appointed managing director with effect from 27th July, 1954, from which date he had in fact been performing the duties of that office and continued as such till 5th September, 1956, when he was appointed chief engineer, an appointment he held till April, 1957, when his appointment was terminated. He ceased to be a director on 2nd August, 1959.

In its early stages the company met with many difficulties. Some of these were technical and were overcome and some were due to a temporary falling off in the demand for iron ore and a consequent lack of customers at a profitable price. But the main difficulty was a shortage of capital. Money was constantly needed for the development of the mining area and money was

short for none was for the time being coming in from sales of ore.

In the course of the year 1956, however, the third parties became interested in the company and in the event they provided a large amount of capital and acquired a considerable body of shares which led for the time being to their virtually obtaining control. There then ensued a dispute between them and the older shareholders which in the end led to litigation. It is not necessary here to discuss the course of this dispute beyond observing that it was terminated by an order of the court dated 27th March, 1957, which was made by consent of all the parties to the litigation including the company.

The effect of that order was that the shares of the third parties in the company were to be cancelled and they were to be granted a sub-lease of the company's mining land. They were to work this land and pay the company a tribute of \$2.70 on every ton of ore sold, the money they had paid in respect of the cancelled shares being treated as an advance on this tribute. There were a number of ancillary provisions but only one of these calls for mention here. That referred to the 1954 agreement between the appellant and Mr. Tan and the material portions of it read as follows:—

"The agreement between Kepong Prospecting Limited and Tan Chew Seah dated the 31st day of July 1954 whereby 1% of the value of all ore sold from the mining land is to be paid by the company to Mr. A. E. Schmidt shall be taken over by the respondents . . . or their nominees and the respondents . . . shall indemnify Kepong Prospecting Limited against all claims which may be made against Kepong Prospecting Limited thereunder."

Throughout the dispute the appellant had sided with the third parties and the day following the court order his appointment as chief engineer was terminated. Thereafter though he continued to be a director of the company till some time in 1959 there is no evidence that he took any further part in the company's affairs.

During all this time the appellant had received no payments under the 1954 or the 1955 agreements and after some correspondence in which the company took up the attitude that they did not object to his being paid provided the third parties did the paying he issued a writ against the company in the present proceedings on 28th June, 1960, in which he asked for an account to be taken of all moneys due to him by the company under either or both the agreements, payment of the amount found due to him and appointment of a receiver.

The company denied liability and said that in any event if anything was due by them under the agreements they were entitled to be indemnified by the third parties whom they impleaded. It is not necessary at this stage to set out all the

A grounds on which they denied liability because it is now clear that only two of them are of substance. As regards the 1954 agreement they pleaded that it was not enforceable by the appellant against them as he was not a party to it. As regards the 1955 agreement they pleaded that it was void for uncertainty and for lack of consideration. They also raised a somewhat curious counterclaim. They said that the appellant was well aware of the course of the 1956-1957 dispute between the company and the third parties that was ended by the consent order of 27th March, 1957, that it was his duty as managing director to bring the existence of the 1955 agreement to the notice of the company's legal adviser (who, I would observe in parenthesis, had in fact drawn it up) that in breach of that duty he failed to do so and that he was therefore liable to the company to the extent of any sum found to be payable to him by the company under that agreement.

D The case came on for hearing before Hashim J. and after a very protracted trial he dismissed both the claim and the counterclaim. He dealt with the legal difficulties in which the case abounded as General Booth used to say he was accustomed to deal with theological difficulties, that is to say he put them on the side of his plate like the bones in his fish. He held that the 1954 agreement was void because the appellant signed it on behalf of Mr. Tan and the power of attorney which he held did not empower him to do so. He then held that the 1955 agreement was void on the ground that the seal of the company was not affixed to it in accordance with article 101 of the company's articles because a Mr. Ironside who witnessed the affixing of the seal as a director was not when he did so a director.

Against the decision of the High Court the appellant has now appealed.

G For myself, I do not think the reasons on which the trial judge based his decision can be supported.

H As regards the 1954 agreement he only considered so much of it as related to the payment of tribute to the appellant. He took the view that as the power of attorney did not contain any reference to this matter and did not in terms empower the appellant to make any agreement on behalf of Mr. Tan which was for his own personal benefit, so much of the agreement as related to the tribute was *ultra vires* the appellant's power and therefore void.

I Having read the power of attorney with some care I am unable to agree. It is unnecessary to quote it at length. It gives the attorney as full powers as can well be imagined to deal with Mr. Tan's mining rights, to act for him in the formation of a company to acquire and

exploit these rights, to do everything necessary in that connection and to settle claims and so forth against Mr. Tan. The 1954 agreement falls fairly and squarely within the four walls of that mandate. It was the instrument which enabled the company to exploit Mr. Tan's rights, it was the instrument which gave Mr. Tan his shares in the company, it was the instrument which discharged Mr. Tan from his liability to the appellant which he had undertaken in his letter of 2nd December, 1953. Assuming responsibility for the payment of the tribute to the appellant was part, and only part, of the consideration given by the company to Mr. Tan and I can see no reason why the making of the portion of the agreement relating to it should be regarded as outside the very wide terms of the power.

As regards the 1955 agreement, this bears the date 26th September, 1955, and on that date Mr. Ironside who witnessed the affixing of the company's seal as a director was not a director and he did become a director until 1st October. Now the date which appears on the face of a document is evidence but it is not necessarily conclusive evidence as to the date on which it was in fact executed (see *Ex parte Slater* ⁽¹⁾) and in the present case there is a considerable body of evidence all of which, for what it is worth, goes to shew that the seal of the company was affixed and was attested by Mr. Ironside some time after 1st October.

Mr. Ironside is a solicitor and was appointed legal adviser and a director of the company as from 1st October at a meeting of the board on 26th September when the agreement was approved. He was present at that meeting only to meet the other directors but he left before it ended. Mr. Ironside's evidence was that he remembered signing the document, that he was positive he did not sign it on 26th September and that as a solicitor he always read documents before he signed them and would not have dreamt of signing anything he was not empowered to sign. He was therefore satisfied that he could not have signed this agreement before his appointment as a director. He very candidly admitted, however, that he could not remember the precise date when the seal was affixed. The judge rejected his evidence because he was "hesitant" and "would appear to be groping about in the dark", which he no doubt was more than seven years after the events to which his evidence related.

There was, however, other evidence. The appellant's own evidence, upon which he was not cross-examined, was that he himself signed the document on 26th September but it could not then be sealed as Mr. Tan whose signature was necessary as that of a permanent director was away

A from Kuala Lumpur. He himself left Kuala Lumpur for a few days, and did not return till the following Sunday, that is 2nd October. The next day, that is 3rd October, Mr. Tan came to his office. He then rang up Mr. Ironside and the three of them went to the office of the secretary and the document was sealed. His evidence was corroborated to some extent by Mr. Marjoribanks whose place as a director Mr. Ironside was taking temporarily. He said Mr. Tan was not present at the meeting of 26th September. It was more fully corroborated by a Mr. Leong who at that time was the secretary. He was sure that the document was not sealed on 26th September but during the first week in October, though he could not remember the exact date. He did remember that the appellant rang him up, that the appellant and Mr. Tan and Mr. Ironside then came to his office and the seal was then affixed to the document and witnessed. In the light of all this evidence, which was not contradicted, it would appear that Mr. Ironside's groping, though in the dark, did not expiscate a wrong result and his evidence should have been accepted.

Turning now to the real questions in issue in the case, it has already been said that the main grounds on which the respondents relied were that the 1954 agreement was not enforceable by the appellant because he was not a party to it and that the 1955 agreement was void for want of consideration and for uncertainty.

As regards the 1954 agreement, it is only necessary to repeat the often quoted words of Lord Haldane in the case of *Dunlop Pneumatic Tyre Co., Ltd. v. Selfridge & Co., Ltd.*:—⁽²⁾

"In the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a *jus quaesitum tertio* arising by way of contract. Such a right may be conferred by way of property, as, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract *in personam*."

Counsel for the appellant made a gallant attempt to avoid the consequences of that doctrine but as was said by Viscount Simonds in the case of *Scruttons, Ltd. v. Midland Silicones, Ltd.*:—⁽³⁾

"If the principle of *jus quaesitum tertio* is to be introduced into our law, it must be done by Parliament".

I should add that at no stage of the case was any attempt made, which in any event would probably have been unsuccessful, to invoke the aid of the case of *Shamia v. Joory*.⁽⁴⁾

That, however, does not get rid of the 1954 agreement. Certainly that agreement was not enforceable by the appellant. But it was not void. It was a perfectly good contract between the company and Mr. Tan. Under it the company got a promise of the assignment of the mining rights the acquisition and working of which was

its principal object. In consideration of this they gave a promise to Mr. Tan to allot to him a number of shares and to pay Mr. Schmidt his tribute. Both these promises were made for good consideration and performance of them could have been enforced at any time but, of course, only by Mr. Tan. As far as the company was concerned there was no question of their paying for services rendered by Mr. Schmidt prior to its inception. They were paying for the assignment of Mr. Tan's mining rights. As far as the enforceability of their promise is concerned they might just as well have promised to pay the tribute to the Lost Dog's Home, only again the promise would not have been enforceable by that institution but by Mr. Tan.

Coming now to the 1955 agreement, this cannot, as was at one stage contended, be regarded as a novation of the 1954 agreement, in the technical sense at any rate, if only because Mr. Tan was not a party to it, though of course he must be presumed to have been aware of its existence and contents. It must, however, be read with the 1954 agreement which was embodied in it.

When it is so read it is clear that so far as the appellant was concerned what he got was a promise that in the future he should have a personal right to recover from the company the tribute which until then was only payable by virtue of a contract which, though perfectly good and binding, was not enforceable by him alone.

For the respondents it is said that they got no consideration at all and in any event, and this is really but another way of putting their argument, the agreement is bad for uncertainty. I will deal with both aspects of this argument together but before doing so two observations fall to be made. One is that the agreement was drafted by the company's own legal adviser and was adopted by the directors. The other is that although the appellant's relations with the company in their latter stages became increasingly unfriendly and in the end were completely broken off and although prior to the commencement of the present proceedings there was considerable correspondence between the solicitors on both sides there was never a breath of any suggestion that the agreement was not valid and binding until the company filed their first defence (they filed several others later) on 26th July, 1960.

Coming to the terms of the agreement itself, it refers to the appellant as the "consulting engineer", not as managing director or chief engineer but as consulting engineer, and it is difficult to see that there is any uncertainty in that term. Then it talks of his "services" and as a matter of construction that would clearly seem to mean services as consulting engineer.

A Then the company undertakes a new obligation which, be it remembered, was not to pay the tribute to the appellant but only to submit to his suing for it himself if necessary, "in consideration of the services rendered by the consulting engineer for and on behalf of the company prior to its formation, after incorporation and for future services". So much of that as relates to any services prior to incorporation is of course *ultra vires* the powers of the company and *ipso facto* void. But if he had rendered services after incorporation for which he had not been paid, as in fact he had done, this discharged the company from the obligation to pay for them as on a *quantum meruit*. Again as regards future services it is perfectly clear the appellant undertook to give his services as consulting engineer as and when the company required them and it is to be observed in this connection that there is no allegation on the pleadings (or suggestion in the evidence) that at any time he failed or refused to render such services.

Then it has been said that the description of what the company was to pay was uncertain. It was "tribute of 1% being calculated on the selling price of the ore as shown in the company's records". On the face of it where is the uncertainty here? There has been some discussion relating to an offer which the appellant made at a later stage to modify this provision. But there is no question of uncertainty. The selling price of ore, like the selling price of anything else, is the price for which it is sold.

Finally it has been said that there is uncertainty as to the time for which the obligations of the parties are to continue. But again it is perfectly clear that the company's obligation is to continue "until the said land is worked out" and that of the appellant is to continue till his death or retirement. Each of these events will be clearly recognizable when it occurs.

So much for lack of consideration and uncertainty.

For the sake of completeness, however, it will be desirable to refer to the circumstances in which the appellant was paid certain modest amounts by way of remuneration because it is said that all the services the appellant rendered to the company were in fact paid for and this, it was suggested, in some way deprived the promises made by the appellant in the agreement of any value.

On the evidence the appellant was never at any time paid a cent for his services as a director. On the 12th of March, 1955, at the third meeting of the board of directors he was appointed managing director but nothing was done about his remuneration. Then on 4th July, 1955, at the fifth meeting of the board of directors it was

decided that he should be paid \$1,000 a month as managing director with effect from 1st March. That was the position when the board at its seventh meeting agreed to the execution of the 1955 agreement on 26th September: the appellant was being paid \$1,000 a month as managing director but he had been paid nothing for all he had done during the seven months between the incorporation of the company and 1st March, 1955. Then on 5th September, 1956, at the fourteenth meeting of the board, the appellant's appointment as managing director was changed to that of chief engineer and his remuneration as such was fixed at \$2,000 a month which he received till he was dismissed on 28th March, 1957.

In all this it is difficult to see anything inconsistent with or indeed having any bearing upon the board's having agreed to accept the appellant's right to enforce directly the company's liability under the 1954 agreement in return for his services as consulting engineer.

There is one other point. At the eighth meeting of the board on 1st March, 1956, when the company was in financial difficulties but when the directors were well aware that the appellant was being paid a salary of \$1,000 a month as managing director he informed the board that he would accept his 1% tribute under the 1955 agreement on the basis that it should be calculated on the f.o.b. price of the ore less export duty and the expenses of barge transport to the ships on which it was exported. There is, however, nothing to show that this offer was accepted and it is difficult to see why the appellant should be held to it now.

That only leaves the question of the counter-claim. This is without substance. In the first place at the material time the appellant was not managing director. In the second place there is not a scrap of evidence to show that anybody was ignorant of or required reminding of the existence of the 1955 agreement. It had been drawn up by the company's legal adviser who was acting for the company in the litigation with the third parties; it was recorded in the minutes of the board's meeting held on 26th September, 1955; and it was frequently discussed at subsequent meetings as something that might be standing in the way of the company obtaining financial assistance. In the third place it is clear from the evidence that the appellant was excluded from the discussions that led up to the consent order. And in the fourth place if it had been overlooked that fact did not affect the company's position *vis-a-vis* the third parties, because the liability of the company to the appellant was to pay the tribute provided for by the 1954 agreement. The only difference made by

A the 1955 agreement was to make that payment directly enforceable by the appellant himself. In the circumstances the company is clearly entitled to indemnity as claimed by them at the hands of the third parties by reason of the consent order of 27th March, 1957.

B In all the circumstances I am of the opinion that in these proceedings the appellant should recover the amount of his tribute as at the date of the writ, that amount to be ascertained on enquiry by the Registrar if it cannot be agreed, and that in the meantime a receiver should be appointed as prayed.

C I would allow the appeal with costs.

Barakbah C.J. (Malaya) and Tan Ah Tah F.J. concurred.

Appeal allowed.

Solicitors: Donaldson & Burkinshaw; Skrine & Co.; Murphy & Dunbar.

OFFICIAL ASSIGNEE v. LIAN HONG & ORS.

[F.C. (Thomson L.P., Barakbah C.J. (Malaya) and Tan Ah Tah F.J.) June 1, 1964]

E [K.L. — Federal Court Civil Appeal No. 77 of 1963]

Bankruptcy Ordinance, 1959, s. 74 — Action against Official Assignee — Action on contract with bankrupt.

F Section 74 of the Bankruptcy Ordinance, 1959, provides in effect that no action shall be maintained against the official assignee in respect of anything done or intended or omitted to be done under the provisions of the Ordinance until the expiry of one month after notice in writing has been served on the official assignee clearly stating the cause of action and the name and address of the plaintiff; and such action shall be commenced within one year of the accruing of the cause of action. In this case the plaintiffs commenced proceedings against the official assignee for specific performance of an agreement for the sale of a piece of land made between them and the person who was later adjudicated a bankrupt.

G Held: an action based on the omission of the bankrupt before he was adjudicated a bankrupt to perform the terms of a contract does not fall within the category of actions dealt with by section 74 of the Bankruptcy Ordinance, 1949, and can be brought without notice being given and without the period of limitation.

Cases referred to:—

- H (1) *Midland Railway Co. v. Withington Local Board* 11 Q.B.D. 788.
 (2) *Lyles v. Southend-on-Sea Corporation* [1905] 2 K.B. 1, 14.
 (3) *Bradford Corporation v. Myers* [1916] 1 A.C. 242, 258.
 I (4) *Brocklebank Ltd. v. The King* [1925] 1 K.B. 52, 66 and 69.

FEDERAL COURT.

Au Ah Wah (Federal Counsel) for the appellant.

F. Keith Sellar for the respondents.